Supreme Court, U. S.
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In The

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-1335

ROBERT ABRAMS, as Attorney General of the State of New York,

Petitioner,

against

DAVID S. SALLA, ROBERT W. KEPPLEY, and LISBON CONTRACTORS, INC.,

Respondents,

and

COUNTY OF MONROE, etc.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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TABLE OF CONTENTS

	Page
Opinions Below	2
Jurisdiction	2
Questions Involved	2
Constitutional Provisions Involved	3
Statutory Provision Involved	4
Statement of the Case	4
Reasons for Granting the Writ	7
The State's Obligation to its Residents	7
The Privileges and Immunities Clause	8
The Commerce Clause and the "Right to Travel"	10
CONCLUSION — For the reasons stated, the petition for a writ of certiorari should be granted	11

APPENDICES

APPENDIX A — Opinion of New York Supreme Court, Special Term, Monroe County dated May 31, 1977	A-1
APPENDIX B — Opinion of Appellate Division, Fourth Department dated November 10, 1978	A-8
APPENDIX C — Opinion of Court of Appeals dated November 29, 1979	A-18
APPENDIX D — New York State Labor Law, § 222	A-34

TABLE OF AUTHORITIES

Cases:	Page
Baldwin v Fish and Game Comm. of Montana, 436 US 371 (1978)	9
CDR Enterprises v Bd. of Education of New York, 412 F Supp 1164	7, 8
City of Philadelphia v New Jersey, 437 US 617 (1978)	10
Crane v New York, 239 US 195 (1915)	7
Doe v Bolton, 410 US 179 (1972)	8
Hicklin v Orbeck, 437 US 518 (1978)	9
Hughes v Alexandria Scrap Corp., 426 US 794 (1976)	10
Lefkowitz v CDR Enterprises, Ltd., 429 US 1031 (1976)	7
Memorial Hosp. v Maricopa County, 415 US 250	10
People v Crane, 214 NY 154 (1915)	7
Reeves Inc. v Kelley, 603 F.2d 736, cert. granted ____ US ____, 48 USLW 3446	10

Statutes:

United States Constitution:	
Article I, Section 8, Commerce Clause	3, 6, 10
Article IV, Section 2, Privileges and Immunity Clause	3, 6, 8
Article XIV, Section 1	3
Fourteenth Amendment	6
United States Code:	
28 USC, Section 1257(3)	2
New York Statute:	
Labor Law, Section 222	1, 2, 3, 4, 6, 7, 8, 10

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner Robert Abrams,* Attorney General of the State of New York, intervenor-appellant, prays that a writ of certiorari be issued to review the order of the Court of Appeals of the State of New York entered on November 29, 1979, which affirmed an order of the Appellate Division, Fourth Judicial Department declaring New York State Labor Law, § 222 in violation of the Constitution of the United States.

*Hon. Robert Abrams has succeeded Hon. Louis J. Lefkowitz, the intervenor-appellant below, as Attorney General of the State of New York.

Opinions Below

1. The opinion of the New York State Supreme Court, Special Term, Monroe County (90 Misc 2d 427) dated May 31, 1977, is set forth as Appendix "A".

2. The opinion of the Appellate Division, Fourth Judicial Department, and dissenting opinion of Justice DILLON (64 AD2d 437) dated November 10, 1978, are set forth as Appendix "B".

3. The opinion of the New York Court of Appeals and dissenting opinion of GABRIELLI, J. dated November 29, 1979 (48 NY2d 514), is set forth as Appendix "C".

Jurisdiction

The New York Court of Appeals held that a provision of the New York statutes (Labor Law, § 222) was in violation of provisions of the Constitution of the United States.

The statutory provision believed to confer jurisdiction on this Court to review the order in question by writ of certiorari is 28 USC, § 1257(3).

Questions Involved

1. Do the provisions of Labor Law, § 222, requiring that, in employment of persons upon public works projects, a preference be given to citizens of New York State who have been residents of the State for twelve consecutive months, violate the constitutional rights of citizens of other states when they are deprived of such employment?

The Courts below held that they do.

2. Does the State, or a local subdivision, have a legitimate interest, in the expenditure of public funds, in preferring the economic welfare of its established residents over transients?

3. Does the Privileges and Immunities Clause, Article IV, Section 2 of the United States Constitution, prohibit a State from granting a preference to its own citizens in the expenditure of public funds?

4. Does Labor Law, § 222 violate the Commerce Clause, Article I Section 8 of the United States Constitution?

Constitutional Provisions Involved

UNITED STATES CONSTITUTION:

Article I, Section 8:

> "General powers of Congress.
>
> The Congress shall have power. — • • •
>
> 3. To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

Article IV, Section 2:

> "1. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

Article XIV, Section 1

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statutory Provision Involved

New York Labor Law, § 222 is set forth as Appendix "D".

Statement of the Case

The individual plaintiffs (Salla and Keppley) are citizens of the United States and permanent residents of the State of Pennsylvania. At the time this action was commenced, they were residing temporarily in the County of Monroe in the State of New York. They describe themselves as permanent, non-supervisory employees of Lisbon Contractors, Inc. (Lisbon), the plaintiff corporation.

Lisbon Contractors, Inc. is a Pennsylvania corporation which, at the commencement of the action, was engaged in the construction of a sanitary sewer interceptor in Monroe County under contract with the Division of Pure Waters of the County of Monroe.

Salla and Keppley were assigned by Lisbon to work on the Monroe County project and leased an apartment in the County in October, 1976. Shortly thereafter, following an inspection of the site by the New York State Department of Labor, the County notified Lisbon that in employing workmen on the project who were not residents of New York State, the corporation was in violation of section 222 of the Labor Law and of its contract, in which it had agreed to comply with all applicable New York State and local laws. After considerable discussion between the principals and their attorneys Lisbon took steps to replace its nonresident employees, including Salla and Keppley, with New York State residents.

The record also indicates, without contradiction, that the unemployment rate in the heavy construction trade in Monroe County at that time was "upwards of 60%".

Plaintiffs then commenced this action for a judgment declaring that Labor Law, § 222, is unconstitutional and void.

Paragraph 22 of the complaint alleges as follows:

> "22. The actions of the defendants in continuing to require compliance by Lisbon with Section 222 of the Labor Law, and the actions of defendants in requiring Lisbon to lay off certain of its permanent non-supervisory employees, including Salla and Keppley, or face termination of its contract, is illegal and invalid for the following reasons:
>
> "A. Section 222 has been held unconstitutional by the Supreme Court of the United States.
>
> "B. Section 222, as it affects the plaintiffs herein, violates Section 1 of the Fourteenth Amendment to the United States Constitution in that it denies the plaintiffs the equal protection of the laws. The imposition of a "preference in employment" to citizens of the State of New York who have resided in the state continuously for twelve months or more creates a classification of citizens that is both unreasonable and arbitrary, and penalizes or otherwise impedes plaintiffs' exercise of fundamental rights guaranteed by the Constitution of the United States.
>
> "C. Section 222, as it affects the plaintiffs herein, violates Article IV, Section 2 of the United States Constitution and Section 1 of the Fourteenth Amendment thereto in that it abridges the privileges and immunities of the plaintiffs herein who are citizens of the United States. These privileges and immunities include the right to travel and be employed, and these are rights of national citizenship with which New York cannot interfere.
>
> "D. Section 222, as it affects the plaintiffs herein, violates Article I, Section 8 of the United States Constitution in that it is an impermissible state regulation of interstate commerce."

A motion for summary judgment on behalf of plaintiffs was granted, in which Special Term declared the preference for State residents in public works employment violated plaintiffs' rights under the Fourteenth Amendment to the United States Constitution, specifically to equal protection of the laws, and under the "Commerce" and "Privileges and Immunities" clauses.

On appeal by defendants and the Attorney General to the Appellate Division, Fourth Department, the judgment was affirmed on the ground that Labor Law, § 222 was violative of the Privileges and Immunities Clause of the United States Constitution (Art. IV, § 2, cl. 1). Accordingly, the question of equal protection was not reached.

Justice DILLON dissented, in a separate opinion, upon the view that the "narrow applicability of the statute * * * removes it from the scope of any challenge under the privileges and immunities clause * * * and justifies its discrimination against non-residents [citations omitted]."

On appeal to the Court of Appeals, it was held that the section offended the Privileges and Immunities Clause. Judge GABRIELLI wrote a dissenting opinion in which Chief Judge COOKE concurred.

Reasons for Granting the Writ

The State's Obligation to its Residents

New York Labor Law, § 222, favoring the employment of New York citizens on public works projects, has been in existence for more than a century. As originally formulated, it prohibited the employment of aliens on public works in addition to favoring New York residents over the citizens of other states. In that form it was the subject of a constitutional challenge in the New York courts in *People v Crane*, 214 NY 154 (1915)* Benjamin CARDOZO, then an Associate Judge of the New York Court of Appeals, writing for the majority, held the statute constitutional in respect to its admitted discrimination against aliens as a class. He wrote:

> "* * * To disqualify aliens is discrimination indeed, but it is not arbitrary discrimination, for the principle of exclusion is the restriction of the resources of the State to the advancement and profit of the members of the State. Ungenerous and unwise such discrimination may be. It is not for that reason unlawful." (214 NY at 161)

More recently, in a similar challenge on behalf of resident aliens, a three-judge Federal Court in the Eastern District of New York held the exclusion of such aliens unconstitutional, in violation of the due process and equal protection clauses of the Fourteenth Amendment, and declared *Crane* "dead". (*CDR Enterprises v Bd. of Educ., City of New York*, 412 F Supp 1164, affd sub nom *Lefkowitz v CDR Enterprises, LTD*, 429 US 1031 [1976]).

While the *Crane* decision was founded on the State's perceived obligation and right to prefer its citizens over all others, the Court in *CDR Enterprises* held that the State's duty ran to all its *lawful residents*, whether citizens or resident aliens. Both *Crane* and *CDR Enterprises*, therefore, emphasize the State's duty to

*affd sub nom *Crane v New York*, 239 US 195 (1915)

protect its lawful residents, whether citizens or resident aliens, from unemployment and economic deprivation. To illustrate, Circuit Judge GURFEIN wrote for the majority in *CDR Enterprises:*

> " • • • The state has a duty to all its lawful residents, resident alien or citizen. It must try to see to it that they do not starve, that they have equal access to state public employment • • • and that they have equal access to private employment. • • • " (412 F Supp at p 1170)

While Judge GURFEIN raised in passing the question of exclusion of citizens of other states "recently moved to New York", the question was not decided. In any case, a distinction between persons "recently moved," for the purpose of re-establishing a residence, and transient workers such as those in the case at bar, would have to be drawn.

Petitioners submit, therefore, that an apparent conflict exists between the holding of the New York Courts in the case at bar and the Federal Court in *CDR Enterprises.*

The Privileges and Immunities Clause

The majority of each of the Courts below concluded that the preference granted New York State citizens and established residents in Labor Law, § 222 violates the Privileges and Immunities Clause of the US Constitution, Article IV, § 2. Petitioners have maintained, however, that a secondary benefit of any public work is the creation of employment, and that the State, by § 222, seeks to extend the benefit of this resource to its own citizens and established residents. In *Doe v Bolton,* 410 US 179 (1972), for example, this Court held a restriction in a Georgia abortion statute, limiting its benefits to Georgia residents, in violation of the Privileges and Immunities Clause on the ground, *inter alia,* that the residence requirement was "not based on any policy of preserving *state-supported facilities* for Georgia residents" (emphasis added). Here, the resource is clearly government-supported, and the preference is not applicable to

the efforts of non-residents to seek private construction work in New York. (See dissenting opinion below of GABRIELLI, J., New York Court of Appeals, Appendix C).

By the same token, the enterprise involved in *Hicklin v Orbeck,* 437 US 518 (1978), the decision which the majority below found controlling, was clearly *private construction,* i.e., the Alaska pipeline, built by a consortium of private oil companies. While that construction was related to a public resource (the North Slope oil deposits) of national importance, the restriction to Alaska residents applied to all employment either directly or remotely connected to the project. Furthermore, it was not the construction of the pipeline itself which would deplete the public natural resource, but rather the eventual oil-drilling. Yet, the "Alaska Hire" statute affected the pipeline construction primarily. In short, in *Hicklin v Orbeck,* the "public resource" exception to the Privileges and Immunities Clause was not viable, in that, by reason of the scope of the Alaska statute, the restriction was only partially, and remotely, applicable to the public resource in question.

Nor should the fact that some Federal funds are involved in the public work at issue here obscure the question presented. The presence of Federal financial assistance is no more relevant than the fact that elk-hunting took place primarily on Federal lands in *Baldwin v Fish and Game Comm. of Montana,* 436 US 371 (1978). In *Baldwin,* the State of Montana's effort to preserve one of its natural resources by a substantial fee on non-resident hunters was upheld in the face of a "Privileges and Immunities" challenge.

The Commerce Clause and the "Right to Travel"

It has been held below that Labor Law, § 222 impedes interstate commerce and the citizen's right to interstate travel. This Court has held, however, in *Hughes v Alexandria Scrap Corp.*, 426 US 794 (1976) that a state may prefer its own resident businesses over those of neighboring states in access to a form of enterprise which the state itself has created through a governmental subsidy without violating the Commerce Clause. It should follow logically, therefore, that a state may prefer its own residents in access to state-provided employment.

In *City of Philadelphia v New Jersey*, 437 US 617 (1978), this Court struck down, on Commerce Clause grounds, a New Jersey statute which barred the shipment of solid waste from neighboring states into New Jersey. It appears, however, that these shipments have been destined for privately-owned landfills. The Court declined to express an opinion as to whether a state may restrict to state residents access to state-owned resources or to spend state funds solely on behalf of its own residents.

(See also *Reeves Inc. v Kelley*, 603 F.2d 736. cert. granted ____ US ____, 48 USLW 3446)

In addition, the limited scope of the statutory preference here does not support a claim that it seriously impeded the right to travel and to work. There is clearly no impediment to travel *per se*, and in fact the legitimacy of a "right to travel" is not beyond doubt*. Nor is there any restriction on a non-resident's entering the state to find work, change jobs or take up residence.

In *Memorial Hospital v Maricopa County, supra*, 415 US 250, an Arizona statute requiring county residence of one year as a condition upon access to free, non-emergency hospital care was held invalid, in violation of the Equal Protection Clause. There,

*See, e.g., *Memorial Hospital v Maricopa County*, 415 US 250 (1974), DOUGLAS, J. concurring, REHNQUIST, J. dissenting.

however, it was conceded that the patient was indigent and a *bona fide* resident of the county, but for less than one year. "Thus," it was noted, "the question of the rights of transients to medical care is not presented by this case" (415 US at 252, fn 3). As Justice MARSHALL indicated in the majority opinion, the extent to which a residency requirement penalizes the exercise of the right to travel is a matter of degree. In the present case the preference in employment of residents over transients is limited only to employment in public works. It does not infringe upon travel, migration or an individual's access to employment in general, except to the justifiable extent noted above.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Dated: Albany, New York
February 13, 1980

Respectfully submitted,

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Appendices

APPENDIX A
Opinion of New York Supreme Court, Special Term, Monroe County dated May 31, 1977

STATE OF NEW YORK
SUPREME COURT – COUNTY OF MONROE

DAVID S. SALLA, ROBERT W. KEPPLEY, and LISBON CONTRACTORS, INC.,

Plaintiffs,

-vs-

COUNTY OF MONROE OF THE STATE OF NEW YORK and THE DIVISION OF PURE WATERS OF THE COUNTY OF MONROE,

Defendants.

INDEX NO. 1739/77

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APPENDIX A
Opinion of New York Supreme Court, Special Term, Monroe County dated May 31, 1977

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DECISION

This action is for a declaratory judgment challenging the constitutionality of Section 222 of the Labor Law of the State of New York.

David Salla (Salla) and Robert Keppley (Keppley) were employed by Lisbon Contractors, Inc. (Lisbon), in the construction of a sanitary sewer interceptor in the County of Monroe. The primary source of Lisbon's business is derived from establishing sanitary systems for municipalities as part of projects that are financed as public works. Salla and Keppley were terminated by Lisbon as required by the County of Monroe by reason of Lisbon's non-compliance with Section 222 of the New York State Labor Law.

The Section provides that in public works construction, "preference in employment shall be given to citizens of the State of New York who have been residents of the State for at least twelve consecutive months immediately prior to the commencement of their employment". The effect of this classification of potential workers on the basis of where they live, and how long they have resided there, is to deny the plaintiffs the equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution.

APPENDIX A
Opinion of New York Supreme Court, Special Term, Monroe County dated May 31, 1977

In moving from state to state for the lawful purpose of obtaining employment, plaintiffs Salla and Keppley were exercising their fundamental constitutional rights to travel and to work, and their right to travel from one state to another "occupies a position fundamental to the concept of our Federal Union". *United States v. Guest*, 383 U.S. 745, 757. Further, "any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional". *Shapiro v. Thompson*, 394 U.S. 618, 634.

Section 222 denies the plaintiffs the opportunity of obtaining and engaging in lawful employment solely because they had not resided in New York for an arbitrarily prescribed period. It not only abridges their fundamental right to travel, but also their right to engage in business, which right was the very purpose of the Fourteenth Amendment. *Truax v. Raich*, 239 U.S. 33. And, this personal right to engage in business encompasses the right to engage in business in another state. *Colgate v. Harvey*, 296 U.S. 404.

The burden of proof to demonstrate that the restrictions imposed by Section 222 are necessary to promote a compelling governmental interest rests on the defendants herein, and it is not sufficient for the State to show that durational residence requirements further a very substantial state interest. *Dunn v. Blumstein*, 405 U.S. 330.

It is readily conceded that New York State has an interest in reducing unemployment — however, protecting employment opportunities of State residents against out-of-state residents is a constitutionally impermissable objective for state legislation, violating both the commerce clause of the United States Constitution, *Polar Co. v. Andrews*, 375 U.S. 361; *Baldwin v. G. A. F.*

Seelig, Inc., 294 U.S. 511, and the equal protection guarantees of the Fourteenth Amendment.

The constitutionality of §222 was before a three-judge Federal Court in *C.D.R. Enterprises, Ltd. v. Board of Education of the City of New York*, 412 F.Supp. 1164 (E.D.N.Y., 1976).

That case involved contractors and the termination of their employees on public works projects because the employees were resident aliens rather than citizens. The contractors and their employees sucessfully challenged the constitutionality of §222 on the ground that by preferring citizens over aliens the statute violated the equal protection clause of the United States Constitution. The three-judge court held that §222 was unconstitutional insofar as it grants "a preference in employment to citizens over aliens. . ." Id. at 1172. This decision was affirmed without opinion by the United States Supreme Court, sub nom, *Lefkowitz v. C.D.R. Enterprises, Ltd.*, No. 75-1817 (January 10, 1977).

It cannot be denied that citizens of the United States have at least the same rights and privileges as resident aliens. See, e.g., *Graham v. Richardson*, 403 U.S. 365, 378 (1971); *Takahashi v. Fish and Game Commission*, 334 U.S. 410, 420 (1948); *Truax v. Raich*, 239 U.S. 33, 42 (1915). State citizenship is defined by the Fourteenth Amendment to the United States Constitution as "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U. S. Const. Amend. xiv, §1. Thus, for persons who are United States citizens, residency in a State is equivalent to citizenship in that State: in this context, citizenship *means* residency.

It is true that Section 222 does not "prohibit" non-New Yorkers from obtaining public employment, but rather "prefers"

potential workers who have lived in New York for twelve months. However, the "preference" imposed by §222 means that non-New Yorkers are at a disadvantage in obtaining employment on public works projects in New York. This, however, in and of itself violates the Privileges and Immunities guarantees of the Constitution. In *Toomer v. Witsell*, 334 U.S. 385, 396 (1947), the Court said that

> "it was long ago decided that one of the privileges which the (Privileges and Immunities) clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State.

The fact that the "preference" applies only to public employment is immaterial to the question of the constitutionality of §222. The constitutional challenge to this statute cannot be answered by the argument that public employment is a "privilege" and not a "right". See, *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970); *Shapiro v. Thompson*, 394 U.S. 618, 627 n.6 (1969). New York may not deny a benefit to a person on a basis that infringes his constitutionally protected interests. See *Sherbert v. Verner*, 374 U.S. 398 (1963). "(W)e may no longer question that state regulation of public employment must accord with the Fourteenth Amendment." *Purdy & Fitzpatrick v. State*, 71 Cal. 2d 566, 456 P.2d 645, 657 (1969).

In *Colgate vs. Harvey*, supra at 428, the Court cited the following language with approval:

> The "privileges and immunities" secured by the original constitution were only such as each state gave to its own citizens. Each was prohibited from discriminating in favor of its own citizens and against the citizens of other states.

APPENDIX A
Opinion of New York Supreme Court, Special Term, Monroe County dated May 31, 1977

> But the fourteenth amendment prohibits any state from abridging the privileges or immunities of citizens of the United States, whether its own citizens or any others. It not merely requires equality of privileges but it demands that the privileges and immunities of all citizens shall be absolutely unabridged, unimpaired. (Citing to the *Slaughter House Case*, 1 Woods 21, 28).

The Court in *Colgate vs. Harvey* went on to say that "(u)nder the Fourteenth Amendment, therefore, the simple inquiry is whether the privilege claimed is one which arises by virtue of national citizenship. If the privilege be of that character, no state can abridge it." Id. at 429. The Court held that the right to travel is such a privilege, and concluded by holding that

> "the right of a citizen of the United States to engage in business * * * in any state other than that in which the citizen resides is a privilege equally attributable to his national citizenship. A state law prohibiting the exercise of * * * (these) rights in another state would, therefore, be invalid under the Fourteenth Amendment." *Id.* at 430-31.

Section 222 attempts to resolve some of the economic problems confronting New York State in the construction industry by reducing competition of persons from out-of-state. This type of legislation is unconstitutional, and this has been affirmed by the Supreme Court in the recent case of *Boston Stock Exchange v. State Tax Commission*, ____ U.S. ____, 97 S.Ct. 599 (January 12, 1977).

The Boston Stock Exchange case discussed the legislative and executive history of Section 270-a which provided certain tax advantages to the sale of stock in New York, as opposed to the sale of stock out-of-state. It was determined that the obvious intent of the legislation was to relieve the New York Stock Exchange from competitive pressures outside the state. Both the

APPENDIX A
Opinion of New York Supreme Court, Special Term, Monroe County dated May 31, 1977

legislature and the Governor notes that the stock exchanges located within the state had contributed to the economy of New York and were important to the future economic prosperity of New York.

The Court held this legislation attempting to protect its security industry to be unconstitutional under the Commerce Clause.

In the instant case, by awarding public work contracts, the state's primary interest is to ensure that the work is performed efficiently, competently and at the lowest cost to the public treasury. Section 222 does not direct itself to these goals, but rather, only with the state residency status of those who will do the work. Such a basis of preference is purely arbitrary, and constitutionally impermissable.

DATED;

May 31, 1977.

/s/ ROBERT E. WHITE
Justice Supreme Court

APPENDIX B
Opinion of Appellate Division, Fourth Department
dated November 10, 1978

SUPREME COURT – STATE OF NEW YORK
APPELLATE DIVISION – FOURTH DEPARTMENT

David Salla, Robert W. Keppley and Lisbon Contractors, Inc.,
Respondents,

v.

County of Monroe of the State of New York and The Division of Pure Waters of the County of Monroe, Appellants, and Louis J. Lefkowitz, Attorney General of the State of New York,
Intervenor-Appellant.

#780/1978

ARGUED: September 21, 1978
DECIDED: November 10, 1978

PRESENT: HON. JOHN S. MARSH, *Presiding Justice;* HON. REID S. MOULE, HON. RICHARD D. SIMONS, HON. MICHAEL F. DILLON, HON. STEWART F. HANCOCK, JR., *Associate Justices.*

Appeals from Order of Monroe Supreme Court, White, J. granting motion for summary judgment.

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MOULE, J.

The principal question involved on this appeal is whether Labor Law Section 222 violates the Privileges and Immunities or Commerce Clauses of the United States Constitution.

In 1976 the County of Monroe (County) through its Division of Pure Waters (Division) advertised for bids for the construction of a sanitary sewer line within the County. The sewer line project is administered by the County and the Division and funded under the Federal Environmental Protection and Pure Water Acts. Lisbon Contractors, Inc. (Lisbon), a Pennsylvania corporation, was awarded the construction contract. Section 76 of

APPENDIX B
Opinion of Appellate Division, Fourth Department
dated November 10, 1978

the contract required Lisbon to abide by all local and state laws to the extent that such requirements do not conflict with Federal laws or regulations.

Lisbon commenced construction of the sewer line in September, 1976 with a work force comprising recently-hired New York residents and permanent Lisbon employees. Lisbon's permanent employees were residents of either Pennsylvania or New Jersey and they came to Monroe County for the purpose of working on the sewer line project. On November 5, 1976 the County informed Lisbon that Labor Law Section 222[1] required that preference in employment on the sewer line project be given to New York State residents. The County advised Lisbon that it was not in compliance with the statute and that Lisbon's failure to comply with the statute by November 15, 1976 would be treated by the County as a breach of their contract. Lisbon responded by asserting that it had attempted to comply with Section 222 of the Labor Law by actively seeking qualified New York residents through advertisements in local papers and that 31 of its 55 workmen on the project were New York State residents. Nevertheless, the County notified Lisbon that unless compliance with Section 222 was achieved by January 14, 1977, it would order all work on the contract suspended. The County, Division and Lisbon conferred on January 10, 1977, at which time Lisbon agreed to replace three nonresident equipment

[1]Insofar as it applies here, Section 222 of the Labor Law provides with respect to the construction of public works that "preference in employment shall be given to citizens of the state of New York who have been residents of the state for at least twelve consecutive months immediately prior to the commencement of their new employment. * * * Persons other than citizens of the state of New York * * * may be employed when such citizens or residents are not available. In each contract for the construction of public works a provision shall be inserted that if this section is not complied with, the contract shall be void."

APPENDIX B
Opinion of Appellate Division, Fourth Department
dated November 10, 1978

operators with qualified New York residents and to continue its efforts to comply with the statute. On January 13, 1977 the County advised Lisbon that it would not terminate the contract in light of Lisbon's continuing efforts to comply with Labor Law Section 222 and that there would be bi-weekly progress reports concerning Lisbon's efforts.

David Salla and Robert Keppley are two of the three equipment operators who were laid off by Lisbon pursuant to the January 10, 1977 meeting. Salla had been employed by Lisbon since May, 1970 and Keppley since November, 1976. Both are residents of Pennsylvania and both became temporary residents of Monroe County for the purpose of working on the project. Neither intends to remain in New York.

Salla, Keppley and Lisbon commenced this suit against the County and Division on January 19, 1977 alleging that Section 222 of the Labor Law violates the Privileges and Immunities, Commerce and Equal Protection Clauses of the United States Constitution. They sought a judgment declaring Labor Law Section 222 unconstitutional and enjoining the County and Division from enforcing it by terminating or suspending Lisbon's contract. The Attorney General intervened as a party defendant. Defendants County and Division challenged the individual employees' standing to assert the unconstitutionality of the Labor Law provision.

Special Term granted a motion by plaintiffs for summary judgment, declared Section 222 of the Labor Law unconstitutional and enjoined the County and Division from enforcing this section by terminating or suspending Lisbon's contract for failure to comply with it. The court held that Section 222 violates the Privileges and Immunities, Commerce and Equal Protection Clauses of the United States Constitution (90

Misc 2d 427). On a direct appeal to the Court of Appeals pursuant to CPLR 5601 (b) (2), the court transferred the case to this court because of the existence of questions other than the constitutionality of a statute (43 NY2d 985).

Initially, defendants County and Division contend that the individual employees, Salla and Keppley, do not have standing to challenge the constitutionality of Labor Law Section 222 because there is no legal relationship between them and the County and Division and because they have not established a nexus between the injury they sustained and the right they seek to vindicate. We hold, however, that the individual employees have standing to challenge this statute because their injuries are likely to be redressed by a favorable decision (*Regents of University of California* v. *Bakke*, ____ US ____, 98 S Ct 2733). Both employees have suffered a loss of employment on the sewer line project and allegedly have not obtained other employment. A decision holding Section 222 unconstitutional will excuse Lisbon's noncompliance with the statute's preference requirement and will allow Lisbon to rehire Salla and Keppley. Furthermore, it has long been recognized that an employee has standing to challenge the unconstitutional interference of third persons with the employer-employee relationship (*Truax* v. *Raich*, 239 US 33, 38-39).

Defendants County and Division contend secondly that Lisbon waived its right to challenge the validity of Section 222 of the Labor Law by failing to object to its preference requirement until after commencement of construction and by making substantial efforts to comply with it. While a party may waive constitutional rights where they are exclusively private and no consideration of public morals or policy is involved (*Mayor, etc., New York v. Manhattan R. Co.*, 143 NY 1, 26; 21 NY Jur, Estoppel, Ratification & Waiver, §91), the courts do not presume

an acquiescence in the loss of fundamental rights (*Ohio Bell Telephone Co.* v. *Commission*, 301 US 292, 307). We do not deem Lisbon's acceptance of the construction contract to be a waiver of its constitutional rights because a public contract should not be conditioned on a waiver of constitutional rights (see *W. W. Cargill Co.* v. *Minnesota*, 180 US 452, 468). Nor do we believe that Lisbon's attempts to comply with the statute in order to avoid breaching the construction contract constitute a waiver of the right to challenge its constitutionality.

Defendants contend thirdly that Section 222 of the Labor Law does not violate the Privileges and Immunities Clause[2] of the Federal Constitution. In *Hicklin* v. *Orbeck* (____ US ____, 98 S Ct 2482) the Supreme Court declared unconstitutional an Alaska statute which provided an employment preference for Alaska residents over nonresidents on the Alaska pipeline project. The Alaska statute was similar to Labor Law Section 222 in that it defined residents as those persons residing in the state for at least 12 months. Additionally, the plaintiffs in *Hicklin* were nonresidents who came to Alaska solely to work on the pipeline. The Court held that the statute violated the Privileges and Immunities Clause, stating that "a resident of one State is constitutionally entitled to travel to another State for purposes of employment free from discriminatory restrictions in favor of state residents imposed by the other State (*Hicklin* v. *Orbeck*, ____ US ____, 98 S Ct 2482, *supra*, p 2488, citing *Ward* v. *Maryland*, 12 Wall 418).

The Court, in *Hicklin*, set forth an analysis of the Privileges and Immunities Clause which we find applicable to Section 222

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[2]This clause provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States" (U.S. Const., art IV, § 2).

of the Labor Law. Under this analysis a state may not discriminate against citizens of other states in situations where there is no valid, substantial reason for such discrimination. In order for a discriminatory statute to be valid, the noncitizens must constitute a peculiar source of the evil which the statute seeks to remedy and there must be a reasonable relationship between the evil and the discrimination (*Hicklin* v. *Orbeck, supra,* p 2488).

The Alaska statute involved in *Hicklin* was designed to counteract high unemployment among Alaskans. The Court noted that the constitutional validity of this purpose was dubious and that even if such a purpose were allowable, the Alaska statute violated the Privileges and Immunities Clause because the discrimination that the statute worked against nonresidents did not bear a substantial relationship to the particular evil which they presented. The statute simply granted all Alaskans, regardless of their employment status, education or training, a flat employment preference for all jobs covered by the statute. The Court found that this statute was not closely tailored to aid the unemployed workers whom the statute was intended to benefit and that "[e]ven if a statute granting an employment preference to unemployed residents or to residents enrolled in job training programs might be permissible, [the statute's] across-the-board grant of a job preference to all Alaskan residents clearly [was] not" (*Hicklin* v. *Orbeck, supra,* p 2489).

The undisputed purpose of Labor Law Section 222 is to alleviate unemployment in New York. In addition, Section 222 is similar to the Alaska statute in *Hicklin* in that it grants an across-the-board job preference to all New York residents. Therefore, Labor Law Section 222 does not bear a substantial relationship to the particular evil it is aimed at and violates the

Privileges and Immunities Clause of the United States Constitution.

Defendants claim their public works project falls within the "state-ownership" exception to the Privileges and Immunities Clause, which allows a state to discriminate against noncitizens with respect to resources owned by the state (see *Hicklin* v. *Orbeck, supra,* Pp 2489-2490). This exception, however, is not absolute; it applies only where the resource is owned wholly by the state. Furthermore, it is inapplicable to "basic and essential activities, interference with which would frustrate the purposes of the formation of the Union" (*Baldwin* v. *Fish & Game Commission of Montana,* ____ US ____, 98 S Ct 1852, 1862). The sewer line construction project involved here is not the type of state resource within the exception (see *Corfield* v. *Coryell,* 6 F Cas 546 [oyster beds owned by New Jersey be limited to use by New Jersey residents]; *McCready* v. *Virginia,* 94 US 391 [Virginia may prohibit nonresident oyster growers from using Virginia public waters]; *Geer* v. *Connecticut,* 161 US 519 [Connecticut may limit disposition of game birds within its boundaries]; see, generally, *Baldwin* v. *Montana Fish & Game Commission, supra,* p 1858). Moreover, the presence of federal funding for the project casts considerable doubt upon the project's status as state-owned.

Defendants contend fourthly that Labor Law Section 222 does not violate the Commerce Clause[4] of the United States Constitution. In the absence of federal legislation, commerce is "open to control by the States so long as they act within the restraints imposed by the Commerce Clause" (*City of Philadelphia* v. *New Jersey,* ____ US ____, 98 S Ct 2531, 2535).

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[4]This clause provides that "Congress shall have the Power * * * To regulate Commerce * * * among the several States" (U.S. Const., art I, § 8).

APPENDIX B
Opinion of Appellate Division, Fourth Department
dated November 10, 1978

These restraints are found not in the language of the clause itself but in decisions of the Court that give effect to its basic purpose, which is to prevent the states from becoming isolated economic units. Where state statutes effect simple economic protectionism, "a virtually *per se* rule of invalidity has been erected" (*City of Philadelphia* v. *New Jersey, supra*, p 2535).

The effect of Labor Law Section 222 is to protect New York residents from the competition of out-of-state labor. In this respect, it results in improper economic protectionism. Although such protectionism was seen by the Legislature as a means to remedy the problem of unemployment in New York, "in the long run prosperity and salvation are in union and not division" (*Baldwin* v. *G.A.F. Seelig*, 294 US 511, 523).

In light of our determination that Labor Law Section 222 unconstitutionally violates both the Privileges and Immunities and Commerce Clauses, we find it unnecessary to reach the contention that it also violates the Equal Protection Clause. We note, however, that Labor Law Section 222 has been held to violate the Equal Protection Clause insofar as it discriminates against resident aliens (*C.D.R. Enterprises, Ltd.* v. *Board of Ed. of the City of New York*, 412 F Supp 1164, affd without opn, sub nom *Lefkowitz* v. *C.D.R. Enterprises, Ltd.*, 429 US 1031).

Accordingly, the judgment should be affirmed.

Marsh, P.J., Simons and Hancock, JJ., concur. Dillon, J. dissents and votes to reverse the judgment and dismiss the complaint in the following Opinion.

DILLON, J. (Dissenting)

I dissent. Given the strong presumption of constitutionality of a legislative enactment and the heavy burden imposed upon one

APPENDIX B
Opinion of Appellate Division, Fourth Department
dated November 10, 1978

who would overcome the presumption, I am not persuaded that section 222 of the Labor Law is unconstitutional upon any of the asserted grounds. The narrow applicability of the statute, limited as it is to public works contracts to be performed exclusively on State land by contractors having a direct contractual relationship with the State's governmental entities and who will be paid solely by the State or its governmental subdivisions, removes it from the scope of any challenge under the privileges and immunities clause (US Const, art IV, §2) and justifies its discrimination against nonresidents (compare Hicklin v. Orbeck, ____ US ____, 98 S Ct 2482, 2489-2491; see McCready v. Virginia, 94 US 391).

Nor do I believe that the commerce clause (US Const, art I, §8), which grants Congress the power to "regulate Commerce with foreign Nations, and among the several States * * *", should be applied, in the circumstances presented, to a public works contract for the construction of a sewer line undeniably situate intrastate (compare City of Philadelphia v. New Jersey, ____ US ____, 98 S Ct 2531; Hicklin v. Orbeck, *supra*, pp 2491-2492; Baldwin v. G.A.F. Seelig, 294 US 511).

Finally, while the durational residency requirement of Section 222 raises a matter of constitutional interest with which we are not here confronted (see, e.g., Phelan v. City of Buffalo, 54 AD2d 262 and cases cited therein), the plaintiffs may not meritoriously claim a denial of equal protection where the State's action is reasonably based and is taken in the exercise of its traditional governmental function.

The judgment should be reversed and the complaint dismissed.

APPENDIX C
Opinion of Court of Appeals
dated November 29, 1979

STATE OF NEW YORK
COURT OF APPEALS

4 No. 481

David S. Salla, et al.,

Respondents,

vs.

County of Monroe of the State of New York, & ano.,

Appellants,

and

Louis J. Lefkowitz, Attorney General of the State of New York,

Intervenor-Appellant.

(481) John D. Doyle, Monroe County Attorney (Christine E. Burke of counsel) for County appellants.

Robert Abrams, Attorney-General (John Q. Driscoll & Jeremiah Jochnowitz of counsel) intervenor-appellant.

Paul R. Braunsdorf, Rochester, for respondents.

FUCHSBERG, J.:

We hold that section 222 of the Labor Law, which mandates preferential employment of New York citizens on public works projects, offends the privileges and immunities clause of article IV, §2 of the United States Constitution.[1]

[1]"The Citizens of each State shall be entitled to all privileges and immunities of Citizens in the several States." This provision, commonly referred to as the "interstate privileges and immunities clause", is to be distinguished from the so-called "national privileges and immunities clause" of the

Footnote continued on next page—

APPENDIX C
Opinion of Court of Appeals
dated November 29, 1979

In broad and unqualified terms, section 222 commands that, in the construction of public works, the State, its subdivisions and the contractors they employ must give "preference in employment * * * to citizens of the state of New York who have been residents of the state for at least twelve consecutive months immediately prior to the commencement of their new employment". The statute comes before us in the following factual and procedural context:

Plaintiffs David S. Salla and Robert W. Keppley, residents of Pennsylvania, are employed as equipment operators by Lisbon Contractors, Inc., a Pennsylvania corporation engaging almost exclusively in the installation of public sanitary sewers. One of the largest firms in its highly-specialized industry, Lisbon carries on its activities throughout the east coast, about forty percent of its work being done away from its home state. It maintains a permanent crew of employees whose experience, ranging in duration in individual cases from between three to sixteen years, averages six years overall. For many employees, the wide-ranging location of Lisbon's job sites has made it necessary for them to shift from one temporary abode to another as Lisbon's projects move them from State to State.

Lisbon was awarded a contract to construct a sanitary sewer line for Monroe County and its Division of Pure Waters.

—*Footnote continued from preceding page*

Fourteenth Amendment, which guarantees to all Americans the rights of national citizenship, such as the right to vote for national officials, the right to petition Congress for redress of grievances and the right to enter public lands (see Tribe, American Constitutional Law, §§ 7-2, 7-4). The latter was one of the clauses adopted after the Civil War "primarily to protect the newly freed slaves from oppression at the hands of the state governments in the south" (Hall, Constitutional Law, § 74).

APPENDIX C
Opinion of Court of Appeals
dated November 29, 1979

Seventy-five percent of the project's funding came from federal monies allocated to implementation of the Environmental Protection and Pure Water Acts of the United States. Salla and Keppley, who were assigned to the Monroe project, immediately entered into a one-year lease for local living quarters. Soon thereafter, their employment terminated because Lisbon found it necessary to accede to the County's insistence on strict enforcement of section 222, which had been incorporated as a term of the contract. The individual employees have alleged that, because of job scheduling conflicts, they would find themselves without work for a period of four to five months.

Salla and Keppley, together with Lisbon, then brought this action, in which they sought a declaration that section 222 is unconstitutional and an injunction against its enforcement.[2] Pursuant to CPLR 1012(b), the Attorney General intervened on behalf of the State in support of the statute's constitutionality. There being no dispute as to the essential facts, on a motion for summary judgment, Special Term, finding support for its determination not only in Article II, §2, but in both the Federal Constitution's commerce clause and its Fourteenth Amendment's equal protection clause as well, granted the requested relief. In turn, the Appellate Division, premising its own conclusion on the privileges and immunities and commerce clauses alone, affirmed (64 AD2d 437). For the ensuing reasons, we uphold its determination, but we find it unnecessary to go beyond the privileges and immunities clause.

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[2]While we note that it may be settled law that corporations are not "citizens" within the meaning of article IV, § 2 and thus cannot seek protection under the clause, we need not address the consequences, if any, of this doctrine in the present case since none of the parties raised the issue below (see, generally, *Paul* v. *Virginia*, 75 US (8 Wall) 1968; Willoughby, The Constitutional Law of the United States [2d ed 1929], § 161).

APPENDIX C
Opinion of Court of Appeals
dated November 29, 1979

Since the circumstances surrounding the adoption of the constitutional clause in question will help clarify the scope of the protection it was intended to afford, we start our analysis with a brief review of its history. Article IV, §2 was born of more than the founding fathers' commitment to the creation of a nation that recognized the universality of "natural rights".[3] By its adoption, the architects of the Constitution also sought to deal with a more specific and immediate problem. For, once the unifying influence of the British Crown had been swept away by the Revolution, strong strains of separatism had emerged among the former colonies. Threatened with the prospect that the treasured independence each of the individual states had now achieved might lead them to adopt highly protectionist economic policies, careful provision to avoid such an eventuality was made as early as in the drafting of the Articles of the Confederation:

> "The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this union, the free inhabitants of each of these states * * * shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and regress to and from any other State and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions, as the inhabitants thereof respectively * * *". (Journal of the Continental Congress [Govt Printing Office, 1906], IX, pp. 908, 909.)

The importance ascribed to the right to travel and to pursue a livelihood or to otherwise engage in trade and commerce is seen from the juxtaposition of these rights with the "privileges and immunities of free citizens". For "privileges and immunities of free citizens" embraced no less than those "natural rights"

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[3]See text p. 4 infra.

thought to inhere in the very concept of civilized government, such as the right to "enjoyment of life and liberty" and "the pursuit of happiness and safety", the denial of which by any of the States would have been unthinkable to the revolutionary theoreticians (*Blake* v. *McClung*, 172 US 239, 248-249; see, generally, Antieau, Modern Constitutional Law [1969 ed], §§9:13, 9:14).

It is a measure of the unanimity that prevailed on this subject that Alexander Hamilton dubbed it the very "basis of the Union" (The Federalist No. 80). So, when the Constitution itself was penned, unlike those provisions whose detail reflects the controversy and compromise that preceded their adoption, the privileges and immunities clause was set out in broad, concise and unqualified terms. (See, generally, 3 Farrand, Record of the Federal Convention of 1787 [1911 ed], at p 112; 5 Elliot's Debates [2d ed 1836], at p 487; Madison, The Federalist No. 42). Ironically, it was this lack of specificity that later would make it possible for courts to be persuaded, on a seemingly *ad hoc* basis, to introduce exceptions to the clause's literal application.

For example, it was held not to interdict a State's conditioning of the right of a nonresident to bring suit on the posting of security for court costs (see *Blake* v. *McClung*, 172 US 239, 256-257), its exclusion of noncitizens from access to State-owned oyster beds (*Corfield* v. *Coryell*, 6 Fed Cas 546), or its requirement that any employee of a nonresident business be deemed an agent for the receipt of process (*Doherty & Co.* v. *Goodman*, 294 US 623). But the clause was applied to strike down statutes under which out-of-state merchants alone were required to take out licenses (*Ward* v. *Maryland*, 12 Wall 418), under which citizen creditors were given a preference over nonresidents in the distribution of assets of local insolvent businesses (*Blake* v. *McClung*, *supra*), under which property of

noncitizens was taxed at a higher rate or in a different manner than that of citizens (*In re Stanford's Estate*, 126 Cal 112) and under which barbers' licenses were restricted to residents (*Templar* v. *Michigan Board of Examiners*, 131 Mich 254).

In all, these cases evidence an approach under which courts, while giving obeisance to the immunity clause's broad-ranging proscription against disabilities when they were based on alienage *per se*, would allow disparate treatment of a noncitizen when the particular circumstances which brought him into the State were, in the exercise of what has been characterized as a largely standardless judicial judgment, deemed sufficient to make differentiation "reasonable" (see Tribe, American Constitutional Law, §6-32, pp 407-408).

However, the time came when the Supreme Court, obviously less than happy with this unstructured and unpredictable method for determining the availability of a constitutional principle on which the unity of the citizens of the nation in large part rested, substituted a more sophisticated measure that balanced the national interest in access to local resources against the local interest in developing home-grown cures for indigenous evils (*Toomer* v. *Witsell*, 334 US 385). *Toomer* involved a South Carolina statute which discriminated against nonresident commercial shrimp fishermen by imposing a license fee a hundred times greater than that charged residents. In declaring that statute invalid, the court did not revert to the absolute language of the clause itself, but, emphasizing that each State had to accord substantial equality of treatment to the citizens of the others, went on to formulate the more precise test that prevails to this day.

The test is two-fold. When a right protected by article IV, §2 is infringed, a court must first determine whether "perfectly valid

independent reasons" for the disparity of treatment exist. But that is not enough. It must also decide whether, quantitatively or qualitatively, the degree of discrimination bears a truly "close relationship" to the reasons assigned (334 US at 396). Since there was nothing in the record in *Toomer* to indicate that nonresident fishermen were a "peculiar source" of the danger of overfishing, the evil which the State claimed it was combatting, the statute was found to be unconstitutional. In the wake of this decision has come renewed appreciation of the breadth of the protections afforded by the privileges and immunities clause (see, e.g., *Doe* v. *Bolton*, 410 US 179 [access to medical services cannot be limited to state residents]; *Matter of Gordon*, ____ NY2d ____ [decided Nov , 1979] [bar examination residency requirements unconstitutional]).

In now applying the *Toomer* test, we observe, initially, that the interests of Salla and Keppley are within the purview of article IV, §2. From the very beginning, it has been clear that the right to ply one's trade in any state in the nation was at the heart of the clause's guarantees. Indeed, the Supreme Court only recently reemphasized this point in a privileges and immunities context by contrasting the fundamental nature of the right of a citizen to earn a living in a state other than his own with the less essential nature of such a pursuit of recreational activity (see *Baldwin* v. *Fish & Game Comm of Montana*, 436 US 371). Moreover, shortly thereafter, in passing on an Alaska statute substantially similar to section 222, the same court, in an approving elaboration of *Toomer*, reiterated the basic tenet that "a resident of one State is constitutionally entitled to travel to another State for purposes of employment free from discriminatory restrictions in favor of state residents imposed by the other State" (*Hicklin* v. *Orbeck*, 437 US 518,525, noted in 12 Akron L Rev 346).

Conscious of the importance of the interest at stake, we turn to the nature of the "independent reason" on which the State and County urge that the statute does not run afoul of the constitutional bar. As did the State of Alaska in *Hicklin*, they insist that a high rate of unemployment in the State justifies the preferring of New York residents for public works jobs. Granted that the counteracting of unemployment is a legitimate state concern, the relevant criteria for privileges and immunities analysis still are whether nonresidents are a "peculiar source" of the evil of joblessness in New York and whether the statute is fashioned with sufficient precision to meet the problem without unduly impinging on the rights of those who do not contribute to it. In the end, nothing less than a unique link between the interest served and the discrimination practiced will do. (See, generally, The Supreme Court, 1977 Term, 92 Harv L Rev 57, 75-86).

Far from any demonstration of a close relationship between nonresident employment on public works projects and unemployment rolls, there is nothing in this record to connect the two at all. In fact, there is nothing to indicate that an influx of nonresidents for any purpose is a major cause of our unemployment. Furthermore, though, simplistically viewed, it of course can be said that every position filled by a Pennsylvania resident is one less job for a New Yorker, the statute does not in fact prefer the unemployed over the employed as replacements for dislocated nonresidents. For all that it provides, qualified residents may be drawn away from ongoing employments in order to accept what they may regard as the more attractive opportunities thus created, an inconsistency given considerable weight in *Hicklin (supra*, pp 527-528).

APPENDIX C
Opinion of Court of Appeals
dated November 29, 1979

Nor is section 222 geared to focus efficiently on its goal. Instead, with blunderbuss overbreadth, it makes no distinction between supervisory and non-supervisory employees, giving no consideration at all to the much smaller universe of jobs or of suitable replacements that are in the offing at that level. And, it goes without saying that, even if the New York pool of workers includes persons with qualifications for the openings the statute forces, a project is likely to be completed more quickly, more efficiently and more economically under supervisors who enjoy an employer's confidence and who are familiar with its practices. Nor is it to be assumed that the readier coordination between experienced supervisors and a team of tried employees who customarily work together is inconsequential. Such factors may readily give rise to a situation in which the disadvantages of additional expense, inconvenience and organizational disruption are sufficient to deter contractors from bidding on New York public works jobs altogether. The consequences hardly "secure [the] community of intercourse" among the states that is the *raison d' etre* of the privileges and immunities clause (*Lemmon* v. *People*, 20 NY2d 562, 607).

The defendants, largely ignoring the fact that most of the project's funds emanated from federal sources, nevertheless maintain that, in any event, the so-called public ownership exception to Article 4, §2 articulated in such cases as *McCready* v. *Virginia* (94 US 391) makes the *Toomer-Hicklin* test inapplicable to this case. But, though the expenditure of state funds was the major factor relied on by the courts in upholding section 222's predecessor statute more than sixty years ago (*People* v. *Crane*, 214 NY 629, affd 239 US 175), the revolution in article IV, §2 jurisprudence wrought by *Toomer* recognized that the state ownership exception was not an indelible canon of constitutional law. Rather, it was premised on a "fiction" designed to highlight

APPENDIX C
Opinion of Court of Appeals
dated November 29, 1979

the importance of the State's interest in the exploitation of a resource, a factor that now is weighed along with many others in the dispositive balancing of local and national priorities in such cases (see *Baldwin* v. *Fish and Game Comm of Montana, supra*, 436 US at pp 385, 386 [wild game]; see, also, *Hicklin* v. *Orbeck, supra*, 437 US at pp 528-530 [oil and gas]). Far from endorsing an approach in which particular resources are categorized according to whether they are passively owned rather than actively created by the State, the recent decisions reaffirm the Constitution's original intendment by probing the full range and depth of the competing considerations that permeate a particular dispute.[4]

Thus, while the Division's project could, in some of its aspects, be thought to be of local concern, the increasing interdependence of one State on another reflected in the renewed emphasis on the privileges and immunities clause hardly permits that factor to control. That interrelationship indeed is epitomized in this very case by the fact that, as it happens, the project was largely financed by the national government. Beyond that, one thing is clear above all. It does not outweigh the constitutional concern for the right of a citizen of one State to pursue his vocation in

[4] *Hughes* v. *Alexandria Scrap Corp.* (426 US 794), relied on by the dissent, is not persuasive authority to the contrary. In that case the Supreme Court held that a Maryland program creating a market for abandoned automobile hulks did not burden interstate commerce despite its incidental effect on nonresident metal processors. Here the very target of the statute is the nonresident, and our focus is on the privileges and immunities clause. Moreover, the *Hughes* Court was careful to note that the State had not sought to forbid or regulate the interstate flow of hulks, an allusion to the prohibition against the erection of absolute trade barriers between the States (*id.* at p 806; see, also, *City of Philadelphia* v. *New Jersey*, 437 US 617). In contrast, section 222 may well have the protectionist effect of discouraging nonresident public works contractors from seeking any New York work whatsoever.

another. And, as to those funds which the State itself invested in this project, it also may not be amiss to suggest, as we have done in the past, that "cost considerations" alone need not dictate "judicial outcome" (*Brooklyn Union Gas Co.* v. *New York State Human Rights Appeal Bd.*, 41 NY2d 84, 90).

Called upon to evaluate the competing considerations in the case before us, we therefore conclude that section 222's potentially absolute barrier to out-of-state public works contractors who seek to market their skills in a legitimate manner within the borders of the State is in conflict with the national policy of economic unity. We further conclude that the State's interest in allocating its funds to their beneficial owners, its citizens — even if it could achieve that here to any degree — is insignificant in comparison.

It follows that the order of the Appellate Division must be affirmed.

GABRIELLI, J. (dissenting):

I cannot agree with the view expressed by the majority that section 222 of the Labor Law violates the Privileges and Immunities Clause of the United States Constitution (US Const, Art IV, §2), as that Clause has been applied in recent years. Accordingly, I would reject the contentions advanced by the plaintiffs in this case and reverse the order of the Appellate Division which struck down the statute as unconstitutional.[1]

[1]In addition to challenging the validity of section 222 of the Labor Law under the Privileges and Immunities Clause, plaintiffs have also raised claims under the Commerce Clause of the United States Constitution (Art I, § 8, cl under the Commerece Clause of the United States Constitution (Art I, § 8, cl 3). For the reasons stated in Presiding Justice Michael F. Dillon's dissenting opinion at the Appellate Division (64 AD2d 437, 445-46), I find the latter claims to be wholly without merit.

I note at the outset that we are not here faced with a challenge to the durational aspects of the residency requirement contained in section 222 of the Labor Law (compare *Shapiro* v. *Thompson*, 394 US 618, with *Sosna* v. *Iowa*, 419 US 393; *Memorial Hospital* v. *Maricopa County*, 415 US 250; and *Vlandis* v. *Klein*, 412 US 441.[2] Nor have we been asked to consider the propriety of a purely regulatory measure calculated to prevent or inhibit nonresident construction workers from traveling into our State and "plying their trade" in the private marketplace (see *Ward* v. *Maryland*, 12 Wall [79 US] 418), for section 222 erects no such barrier to outsiders seeking employment within the State. Rather, we are asked only to determine whether New York State may refuse to do business with those who hire nonresidents without running afoul of the Privileges and Immunities Clause of the United States Constitution.

In concluding that it may, I draw upon principles derived from the related body of interpretive law associated with the Commerce Clause (US Const, Art I, §8, cl 3). Although the Commerce Clause, like the Privileges and Immunities Clause, generally prohibits states from using their regulatory powers to discriminate against interstate commercial activities (e.g., *Baldwin* v. *GAF Seeling, Inc.*, 294 US 511; *Blake* v. *McClung*, 172 US 239, cf *Matter of Gordon*, ____ NY2d ____ [dec Nov , 1979]), it does not impose a similar restriction upon a state's right to use its spending powers to promote local industry or give its citizens

[2]Section 222 of the Labor Law requires that public works contractors give preference in hiring to job applicants who have been New York State residents for at least 12 consecutive months. While there may be some question concerning the validity of this durational requirement, plaintiffs in this case have no standing to raise such a question, since they admittedly have no intention of establishing residency in New York under any circumstances.

a competitive edge in pursuit of its governmental goals (*Hughes* v. *Alexandria Scrap Corp.*, 426 US 794). This is especially so where, as here, the state's decision to spend creates a new or additional market for the particular goods or services which would not otherwise have existed (*Hughes* v. *Alexandria Scrap Corp., supra*, pp 806-10).[3] Indeed, it is because section 222 is directed only at those job opportunities which are created by the State's exercise of its spending power that the cases cited by the majority are not controlling here.

In *Toomer* v. *Witsell* (334 US 385) and the cases that followed (e.g., *Hicklin* v. *Orbeck*, 437 US 518; *Mullaney* v. *Anderson*, 342 US 415), the Supreme Court made clear that the mere "ownership" by a state of a natural resource does not, without more, provide sufficient justification for the state to enact legislation limiting access to that resource to its own residents. According to the *Toomer* line of cases, the Privileges and Immunities Clause precludes states from hoarding their resources for their own citizens unless it can be shown that the use of the resource by outsiders poses a "peculiar" threat to the resource's existence and, additionally that the discriminatory measure adopted by the state bears a substantial relation to the type of harm it purports to prevent.

An entirely different question is presented, however, when a state seeks to preserve for the enjoyment of its citizens a "resource" it has created through its own efforts (Tribe, American Constitutional Law, §6.33, Supp [1979], pp 38-39; see

[3]The majority bolsters its position by noting that the public works project at issue in this case was heavily financed by the federal government. I fail to grasp the significance of this fact, however, since there are no indications in the record that the hiring preference mandated by section 222 of the Labor Law contravenes any of the policies underlying the federal legislation which authorized the sewer project subsidy.

Baldwin v. *Fish & Game Comm of Montana*, 436 US 371). Under such circumstances, the doctrine enunciated in *Toomer* would appear to be of little significance.

That this is so is strongly suggested by the Supreme Court's language in *Doe* v. *Bolton* (410 US 179), a case involving a constitutional challenge to a Georgia statute which precluded nonresidents from obtaining abortions at any medical facilities within the state whether privately or publicly operated. Citing its earlier decision in *Toomer* v. *Witsell* (334 US 385), the Supreme Court in *Bolton* held that the Privileges and Immunities Clause "protect[s] persons who enter Georgia seeking the medical services that are available there", but noted that its conclusion might be different if the challenged statute was based upon a more limited policy of "preserving state-supported facilities for Georgia residents * * * *" (*Doe* v. *Bolton, supra*, p 200; see Tribe, American Constitutional Law, §6.33, Supp [1979], pp 38-39 & n92).

Like the hypothetical statute in *Bolton*, section 222 of the Labor Law is calculated only to preserve for New York State residents the expanded employment opportunities that are created when the state embarks upon a public works project. The statute does not prevent out-of-state laborers from coming into the state and securing jobs in their accustomed field; rather, it simply establishes, as a matter of public policy, that when the State of New York enters the marketplace as a purchaser of services, it will use its bargaining power to promote the interests of its citizens. In my view, there is nothing in the Privileges and Immunities Clause or in the case law interpreting it that would proscribe such a policy.

I note that the Supreme Court's recent decision in *Hicklin* v. *Orbeck* (437 US 518) does not suggest a contrary conclusion. In

Hicklin, the Court struck down as violative of the Privileges and Immunities Clause an Alaska statute which mandated that "all oil and gas leases, easements or right-of-way permits for oil and gas line purposes" obtained from the state's Natural Resources Commissioner contain a provision requiring the lessee to give preference in hiring to Alaska residents. The "Alaska Hire" statute was broadly drafted, its reach extending to all private employment generated by activities within the state "which [are] a result of oil and gas leases, easements or right-of-way permits". Finding no substantial relationship between the discriminatory effect of the statute and the "evil" it was designed to address, the state's high unemployment rate, the Supreme Court concluded that the statute was incompatible with the Privileges and Immunities Clause.

Although there are superficial similarities between section 222 of the Labor Law and the "Alaska Hire" provisions struck down in *Hicklin*, the fundamental differences between the legislative measures becomes apparent when the two are closely compared. The "Alaska Hire" statute represented a naked attempt by the state to use its fortuitous ownership of the rights to gas and oil lands as a predicate for regulating the hiring practices of private employers in a manner that would otherwise be impermissible under the Privileges and Immunities Clause. While acknowledging that a state's ownership of a resource will ordinarily be the dispositive factor in evaluating whether a discriminatory statute passes muster under the Privileges and Immunities Clause (see *McCready* v. *Virginia*, 94 US 391), the Supreme Court nevertheless rejected the enactment at issue in *Hicklin*, stating:

> "Alaska has little or no proprietary interest in much of the activity swept within the ambit of Alaska Hire; and the connection of the State's oil and gas with much of the

> covered activity is sufficiently attenuated so that it cannot justifiably be the basis for requiring private employers to discriminate against nonresidents" (437 US at 529).

In contrast, New York State has a clear and direct proprietary interest not only in the "resource" with which section 222 of the Labor Law is concerned, but also in the activities subsumed within the statute's terms: public works projects. Indeed, it is New York's ongoing interest in and control over public works projects that renders section 222 of the Labor Law constitutionally unobjectionable. While it is true that a state may not baldly exploit its passive ownership of a resource by indirectly using it as a basis for requiring discrimination against nonresidents in private hiring, nothing in *Hicklin* or the cases preceding it suggests that when a state has created a resource such as job opportunities, it cannot direct that the resource be used to the advantage of its own citizens.

For the foregoing reasons, I vote to reverse the determinations below.

Order affirmed, with costs. Opinion by Fuchsberg, J. All concur except Gabrielli, J., who dissents and votes to reverse in an opinion in which Cooke, Ch.J., concurs.

Decided November 29, 1979

APPENDIX D
New York State Labor Law, § 222

Exhibit B — Section 222 of the Labor Law of the State of New York annexed to Complaint.

§ 222. Preference in employment of persons upon public works

In the construction of public works by the state, a municipal subdivision including a school district, or a state or municipal public benefit corporation, authority or commission or any agency entering into public works projects providing for the expenditure of public money or by persons contracting with the state, a municipal subdivision including a school district, or a state or municipal public benefit corporation, authority or commission, or any agency entering into public works projects providing for the expenditure of public money, preference in employment shall be given to citizens of the state of New York who have been residents of the state for at least twelve consecutive months immediately prior to the commencement of their new employment. In addition to the foregoing provisions, whenever the unemployment rate in a statistical metropolitan sampling area (SMSA) in New York state is determined by the federal Labor Board Bureau of Labor Statistics to be six per centum or more for a period of three consecutive months, such preference in employment on public works projects in that SMSA shall be given first to the qualified citizens of the state of New York who have been residents of such SMSA for twelve consecutive months prior to the commencement of their employment, said preference to continue until such time as the unemployment rate for such SMSA as so established shall be below six per centum for three consecutive months. The provisions of this section shall not be applicable to any such corporation, authority or commission whose existence and jurisdiction is fixed by compact, treaty, action or agreement with other states or nations. Each person so employed shall

furnish satisfactory proof of residence and qualification in their trade or skill, in accordance with rule adopted by the industrial commissioner. Persons other than citizens of the state of New York or residents of such SMSA may be employed when such citizens or residents are not available. In each contract for the construction of public works a provision shall be inserted that if this section is not complied with, the contract shall be void. All officers, agents or employees of the public entities set forth in the foregoing, having the power to enter into contracts which provide for the expenditure of public money on public works, shall file in the office of the department the names and addresses of all contractors holding contracts with such public entities, together with a description of the work and its location. The commissioner shall require each contractor to furnish a list of the names and addresses of all his subcontractors. Each contractor and subcontractor performing public works shall keep a list of his employees, stating whether they are citizens of the state of New York, native born citizens or naturalized citizens and in case of naturalization, the date thereof, and the name of the court in which granted, a copy of which shall be filed in the office of the department. All information required to be filed pursuant to this section shall be filed in accordance with the rules of the industrial commissioner. All of the data and information required by this section to be filed with the department shall be available for public inspection and copying, subject to and in accordance with the provisions of article six of the public officers law, constituting the freedom of information law. A violation of this section shall constitute a misdemeanor and shall be punishable by a fine of not less than fifty dollars nor more than five hundred dollars, or by imprisonment for not less than thirty nor more than ninety days, or by both fine and imprisonment.

As amended L.1974, c. 207, §1; L.1975, c. 848, §1.

Supreme Court, U. S.
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In The

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1335

ROBERT ABRAMS, as Attorney General of the State of New York,

Petitioner,

against

DAVID S. SALLA, ROBERT W. KEPPLEY, and LISBON CONTRACTORS, INC.,

Respondents,

and

COUNTY OF MONROE, etc.,

Respondents.

On Petition For A Writ of Certiorari To The Court of Appeals Of The State of New York

BRIEF IN OPPOSITION OF RESPONDENTS, DAVID S. SALLA, ROBERT W. KEPPLEY, and LISBON CONTRACTORS, INC.

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TABLE OF CONTENTS

	Page
Question Presented	2
Statement of the Case	2
Reasons Why The Writ Should Be Denied	4
1. *There is no conflict between the decision of the New York Court of Appeals and the decisions of this Court or other Federal courts*	4
2. *The legal argument made by the State is not applicable in light of the facts of this case*	7
3. *It is not clear from the record in this case that Salla and Keppley are transients, and if they are New York residents, a distinction between them and other New York residents based on duration of residency is unconstitutional*	8
4. *Any decision based upon the determination that Salla and Keppley are transients would be of limited application because many other persons could challenge §222 on the ground that it violates the Equal Protection Clause*	9
5. *The decisions of the New York courts which considered this case were correct, and this Court need not further review this case*	11
Conclusion	14

TABLE OF AUTHORITIES

Cases Cited: Page

Ambach v. Norwick, 441 U.S. 68 (1979) 13

Baldwin v. Fish & Game Comm'n. of Montana, 436 U.S. 371 (1978) 7, 8, 11, 12

Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935) 12

Boston Stock Exchange v. State Tax Comm'n., 429 U.S. 318 (1977) 13, 14

Brown v. Anderson, 202 F.Supp. 96 (D. Alas. 1962). 12

C.D.R. Enterprises, Ltd. v. Board of Education of the City of New York, 412 F.Supp. 1164 (E.D.N.Y. 1976), *aff'd without opinion, sub nom, Lefkowitz v. C.D.R. Enterprises, Ltd.*, 429 U.S. 1031 (1977) 4

City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) . . 6, 13

Corfield v. Coryell, 6 F.Cas. 546 (C.C.E.D. Pa. 1825) 12

Corwin Consultants, Inc. v. Interpublic Group of Companies, Inc., 512 F.2d 605 (2d Cir. 1975) 8

Douglas v. Seacoast Products, Inc., 431 U.S. 265 (1977). . . 6

Dunn v. Blumstein, 405 U.S. 330 (1972) 10

Foley v. Connelie, 435 U.S. 291 (1978) 13

Geer v. Connecticut, 161 U.S. 519 (1896), *overruled, Hughes v. Oklahoma*, 441 U.S. 322 (1979) 12

Hicklin v. Orbeck, 437 U.S. 518 (1978) 11, 12

Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976). . . 5, 6, 7

McCready v. Virginia, 94 U.S. 391 (1877) 12

Nehring v. Ariyoshi, 443 F.Supp. 228 (D. Hawaii 1977) . . 10

Shapiro v. Thompson, 394 U.S. 618 (1969). 9, 10

Page

State v. Kemp, 73 S.D. 458, 44 N.W.2d 213 (1950), *appeal dismissed*, 340 U.S. 923 (1951) 12

Toomer v. Witsell, 334 U.S. 385 (1947) 6, 11

Truax v. Raich, 239 U.S. 33 (1915) 13

Vlandis v. Kline, 412 U.S. 441 (1973) 8

Statutes:

N.Y. Labor Law §222 (McKinney, 1975) . . . . . *Passim*

Other authorities:

L. Tribe, *American Constitutional Law* §6-10 (1978) 5

In The

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ROBERT ABRAMS, as Attorney General of the State of New York,

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On Petition For A Writ of Certiorari To The Court of Appeals Of The State of New York

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BRIEF IN OPPOSITION OF RESPONDENTS, DAVID S. SALLA, ROBERT W. KEPPLEY, and LISBON CONTRACTORS, INC.

The respondents, David S. Salla, Robert W. Keppley and Lisbon Contractors, Inc., respectfully request that this Court deny the petition for writ of certiorari, seeking review of the decision of the Court of Appeals of the State of New York. That decision is reported at 48 N.Y.2d 514 (1979).

QUESTION PRESENTED

Is §222 of the Labor Law of the State of New York, which grants "preference in employment [on public works projects] . . . to citizens of the State of New York who have been residents of the state for at least twelve consecutive months immediately prior to the commencement of their new employment", unconstitutional? All of the Courts below held that §222 is unconstitutional.

STATEMENT OF THE CASE

In the summer of 1976, Lisbon Contractors, Inc. (hereinafter referred to as "Lisbon"), one of the respondents herein, was awarded a contract to construct a sanitary sewer interceptor line in the Town of Greece, County of Monroe, State of New York. (R. 28, R.41 and A. 9)* (Greece is a suburb of Rochester, New York.) This construction project (hereinafter referred to as "the Project") was a New York public works project funded under the Environmental Protection and Pure Waters Acts of the United States and administered by the respondents, the County of Monroe of the State of New York and The Division of Pure Waters of the County of Monroe. (R. 28, R. 41 and A. 9) (These respondents are hereinafter collectively referred to as "the County".) Seventy-five percent of the funding for the Project came from the United States government under the Environmental Protection Act and the Pure Waters Act. (R. 51 and A. 20)

Lisbon is a Pennsylvania corporation specializing in the installation of sanitary sewers. It is the third largest such contractor on the East coast, and the ninth largest in the United States. All of its work is on public works projects, and approximately 40% of its work has been on projects outside the State of Pennsylvania. (R. 51 and A. 19)

*References designated "R" are to pages in the record, and references designated "A" are to pages in the appendix attached to the petition for certiorari.

Lisbon has a crew of experienced supervisory and non-supervisory employees who work with it on projects throughout the East coast, and many of these employees take up residence in the state in which they are working. (R. 51 and A. 19) The respondents, David S. Salla (hereinafter referred to as "Salla"), and Robert W. Keppley (hereinafter referred to as "Keppley"), are two Lisbon employees who took up residence in New York after being assigned to work on the Project. (R. 52 and A. 20)

Lisbon began construction on the Project on September 15, 1976. (R. 52 and A. 10) Salla, an employee of Lisbon since May 1970, began work on the Project in October 1976, and Keppley, an employee of Lisbon since November 1966, began work on the Project in December 1976. (R. 55, R. 58-59 and A. 10) Salla, Keppley and two other Lisbon employees rented an apartment, under a one-year lease, in Rochester, New York when they began work on the Project. (R. 55-56, R. 59 and A. 20)

Shortly after Lisbon began working on the Project, the County wrote to Lisbon and told it to take action to comply with the requirement of §222 of the Labor Law that preference for jobs on the Project be given to persons who had resided in New York for 12 months. (R. 36 and A. 20) Thereafter, numerous discussions took place between representatives of Lisbon and the County and eventually Lisbon was informed that, unless it complied with §222, all of its work on the contract would be suspended. (R. 38 and A. 10)

Because of the threats from the County, Lisbon terminated the employment of Salla and Keppley as well as 11 other of its employees. (R. 53 and A. 20) Lisbon, Salla and Keppley then commenced this action for a judgment declaring that §222 of the Labor Law is unconstitutional.

REASONS WHY THE WRIT SHOULD BE DENIED

1. *There is no conflict between the decision of the New York Court of Appeals and the decisions of this Court or other Federal courts.*

Petitioner, Robert Abrams, as Attorney General of the State of New York (hereinafter referred to as the "State"), argues that there is a conflict between the decision by the Court of Appeals of the State of New York in this case and the decision of a three-judge Federal court in *C.D.R. Enterprises, Ltd. v. Board of Education of the City of New York*, 412 F.Supp. 1164 (E.D.N.Y. 1976), *aff'd without opinion, sub nom., Lefkowitz v. C.D.R. Enterprises, Ltd.*, 429 U.S. 1031 (1977) (hereinafter cited as "*C.D.R. Enterprises*"). The Court in that case was confronted with the question of whether resident aliens could be terminated from their employment on a public works project because of their alien status. The statute was successfully challenged on the ground that, by preferring citizens over aliens, the statute violated the Equal Protection Clause of the United States Constitution. In its decision, the Court stated that "while we need make no determination on the matter here, there is no reason to suppose that New York has a right to impede the *employment* of a New Jersey citizen who has recently moved to New York." 412 F.Supp. at 1171[Emphasis in original].

It is difficult to see how there is any conflict between this language and the decision rendered by the Court of Appeals in the case at bar. The State argues, however, that a distinction has to be made between persons "recently moved" and transient workers such as Salla and Keppley. Even assuming, however, that such a distinction has to be made, this was a distinction not before the Court in *C.D.R. Enterprises*. Therefore, there can be no conflict between the decision in the case at bar and the decision in *C.D.R. Enterprises*.

Although the State points only to the *C.D.R. Enterprises* decision as being in direct conflict with the decision of the New

York Court of Appeals, there are two other cases to which the State refers which it apparently believes are in conflict with the decision of the Court of Appeals.

The State argues that this Court's decision in *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976) (hereinafter cited as "*Hughes*"), indicates that a state may prefer its own residents in access to state-provided employment. Preliminarily, it must be noted that the statute involved in *Hughes* was not challenged under the Privileges and Immunities Clause, the basis of the decision of the Court of Appeals in the case at bar. Even apart from this fact, *Hughes* is distinguishable on several grounds.

The first and most obvious distinction between *Hughes* and the case at bar is that in the case at bar New York funds are not used exclusively on the Project. In fact, the Project was funded by the Environmental Protection Act and the Pure Waters Act of the United States and administered by the County. Seventy-five percent of the funds for the Project came from the United States.

When a public works project in New York is federally funded, the "consumers" of the services of people like Lisbon, Salla and Keppley are United States taxpayers. These "consumers" may well be paying an artificially high price for the services of preferred New Yorkers who may not be able to work as efficiently or as cheaply as people like Lisbon, Salla and Keppley. The burden on interstate commerce is obvious and may be significant. *Cf.*, L. Tribe, *American Constitutional Law* §6-10 (1978).

Linked to this effect on the ultimate "consumer" is the fact that the market in *Hughes* was created by the State. *Hughes* at 809, n. 18. Thus, any burden on the movement of hulks was a burden on an item that would not have been in the stream of commerce except for the Maryland subsidy program. Because of this, the subsidies paid by Maryland to help rid the environment

of abandoned automobiles did not have the effect, as other subsidies might, of forcing consumers in other states to pay higher prices for the commerce in issue.

In addition to these differences, it is also important to note, as this Court did on various occasions in *Hughes*, that out-of-state competitors were not barred from the Maryland market. This Court "emphasize[d] that the . . . amendment [in question], by its terms, does not *require* unlicensed suppliers to deliver hulks in State to receive enhanced prices." *Id.* at 806, n. 15 [Emphasis in original]. Later in its opinion, this Court noted that the hulks in question "remain within Maryland in response to market forces, including that exerted by money from the State." *Id.* at 810.

There is no question that the market forces in *Hughes* were slanted in favor of the delivery of hulks to Maryland processors. However, market forces were still allowed to work. By contrast, §222 does not allow market forces to work. People such as Salla and Keppley do not have the right, under §222, to try to show that it is more advantageous for an employer to hire them than to hire somebody who meets the statute's requirements. Section 222 does not subsidize an employer who hires a New Yorker instead of a person from out of state. Rather, under §222, an absolute preference is given if there is a New York resident able and willing to work on a public works project even though the resident may be less able than persons such as Salla and Keppley.

The State also argues that in *City of Philadelphia v. New Jersey*, 437 U.S. 617, 627, n. 6 (1978), this Court declined to express an opinion as to whether a state could restrict to state residents access to state-owned resources or as to whether a state could spend state funds solely on behalf of its residents. In making the statement about state-owned resources, this Court referred to *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 283-90 (1977) and *Toomer v. Witsell*, 334 U.S. 385, 404 (1947). At the particular pages referred to in these cases, this Court discussed

the ability of a state to retain certain natural resources within its borders. In both cases, the natural resources in question were fishes located within the boundaries of the states in question. No such question of retaining natural resources is present in the case at bar.

In making the statement about the spending of state funds solely on behalf of its own residents, this Court cited *Hughes*. The distinctions between *Hughes* and the case at bar already have been discussed.

2. *The legal argument made by the State is not applicable in light of the facts of this case.*

The State argues in its petition for certiorari that two of the questions involved in the case at bar relate to whether a state may, in the expenditure of public funds, prefer the economic welfare of its long-term residents over transients. Assuming, *arguendo*, that a state has the right to prefer its long-term residents in the expenditure of state funds, this issue is not posed by the case at bar. As already pointed out, 75% of the funds for the Project came from the United States. Thus, it is mostly federal funds, not state funds, which are being expended for the benefit of long-term New York residents.

The State argues, however, that the presence of federal financial assistance is no more relevant in the case at bar than was the fact that elk hunting took place primarily on federal lands in *Baldwin v. Fish and Game Comm'n of Montana*, 436 U.S. 371 (1978). However, in its decision in that case, this Court drew a line relating to "distinctions between residents and nonresidents [which] merely reflect the fact that this is a Nation composed of individual States, and are permitted [and] other distinctions [which] are prohibited because they hinder the formation, the purpose, or the development of a single Union of those States." *Id.* at 383. This Court went on to point out that some activities were so basic and fundamental that interference

with them would frustrate the purpose of the Union. Recreational big game hunting was not such an activity, but clearly "a nonresident's right to pursue a livelihood in a state other than his own [is] a right that is protected by the Privileges and Immunities Clause." *Id.* at 386.

3. *It is not clear from the record in this case that Salla and Keppley are transients, and if they are New York residents, a distinction between them and other New York residents based on duration of residency is unconstitutional.*

The State repeatedly refers to Salla and Keppley as transients. However, Salla and Keppley both took a year's lease on apartments in Rochester, New York when they began work on the Project and planned to live in Rochester for at least that long. Had the Project lasted for more than a year, they would have continued to live in Rochester. There is, therefore, despite the State's references to Salla and Keppley as transients, a real question as to whether they were residents of New York. *See, Corwin Consultants, Inc. v. Interpublic Group of Companies, Inc.*, 512 F.2d 605, 609-610 (2d Cir. 1975) (The Court referred to the nebulous nature of the concept of residency and said that a person could have more than one residence.) *Cf., Vlandis v. Kline*, 412 U.S. 441, 452 (1973). If this Court were to hear this case, the abstract legal issue of whether transients have a right to employment on public works projects would not be presented as sharply as the State implies as it would be necessary to determine whether Salla and Keppley were residents or transients.

If Salla and Keppley are deemed to be New York residents, it has to be conceded that they had not been residents for 12 months before starting work on the Project. Therefore, it might be argued that the durational residency requirement of the statute could be considered by this Court. However, durational residency requirements consistently have been held unconstitutional by this Court upon the ground that such requirements infringe upon fundamental constitutional rights, including the right to travel among the states. Such restrictions will be held constitutional only when found necessary to promote a compelling governmental interest. *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

There is nothing in the case at bar to show that a compelling governmental interest was served by the enactment of §222. The State contends that 60% of the workers in the heavy construction trades in Monroe County were unemployed in 1976, but there is no indication in the record as to any relationship between this unemployment and the fact that certain workers come from out-of-state to work in New York. There are, in short, no facts to show that the out-of-state workers are a source of the high unemployment.

Even if it is assumed that such workers are a source of the unemployment, an attempt to save money for its long-term residents would not be a sufficient justification for New York to infringe fundamental constitutional rights of its new residents. To permit this "would logically permit the State to bar new residents from schools, parks and libraries or deprive them of police or fire protection." *Shapiro v. Thompson, supra* at 632.

4. *Any decision based upon the determination that Salla and Keppley are transients would be of limited application because many other persons could challenge §222 on the ground that it violates the Equal Protection Clause.*

Even if it is assumed that Salla and Keppley were only transients and thus not entitled to challenge §222 on Equal Protection grounds, such a decision would have limited effect. It is clear that the statute does infringe the right to travel by penalizing persons who come to New York and who want to work on public works projects. If these persons are not allowed, because of the prohibition of §222, to gain employment on a

public works project, their ability to travel freely from state to state will have been impaired, and they could challenge the requirements of §222 as being in violation of their rights under the Equal Protection Clause.

It also is clear that §222 will deter travel for certain persons who want to move to New York but who want to seek employment on public works projects. However, it is not even necessary to show that persons have been deterred from traveling to New York by the effect of §222. An argument was made in *Dunn v. Blumstein*, 405 U.S. 330, 339-40 (1972), that the statute in question had to be intended to deter travel, and this Court responded by stating:

> This view represents a fundamental misunderstanding of the law. . . . *Shapiro* did not rest upon a finding that denial of welfare actually deterred travel. Nor have other "right to travel" cases in this Court always relied on the presence of actual deterrence. In *Shapiro* we explicitly stated that the compelling-state-interest test would be triggered by "any classification which serves to *penalize* the exercise of that right [to travel]. . . ." *Id.*, at 634 (emphasis added). Indeed, none of the litigants [in *Shapiro*] had themselves been deterred.

The State argues that people coming to New York from other states still have the right to compete for jobs in the private sector. However, the limitation on the right of persons outside New York to come to New York and have the opportunity to immediately secure employment on a public works project is significant given the amount of public works projects in New York. The importance of such a limitation was recognized in *Nehring v. Ariyoshi*, 443 F.Supp. 228, 237 (D. Hawaii 1977), in which the Court invalidated Hawaii's one-year durational residency requirement for public employment, concluding that such a statute penalized the right to travel:

> [T]he forced inability of a new resident to apply for 12% of the available jobs is a penalty, particularly for those

> people trained for work performed primarily by government. Even though private jobs are still available, the universe of potential jobs is smaller.

To sum up, even if Salla and Keppley are transients, the effect of §222 might be saved only as to them and persons like them. However, any person penalized for traveling to New York to reside in New York would be able to challenge §222 on Equal Protection grounds.

5. *The decisions of the New York courts which considered this case were correct, and this Court need not further review this case.*

The Court of Appeals of the State of New York considered only the Privileges and Immunities Clause of the United States Constitution in rendering its decision. The Appellate Division, from which an appeal was taken to the Court of Appeals, considered both the Privileges and Immunities Clause and the Commerce Clause. The Supreme Court of the State of New York considered both of these grounds and, in addition, the Equal Protection argument advanced by Lisbon, Salla and Keppley. On all three of these bases, the unconstitutionality of §222 is clearly shown and this Court need not further review the issue of the constitutionality of §222.

Any questions concerning the scope of the Privileges and Immunities Clause and its application to the case at bar were resolved by this Court's decisions in *Hicklin v. Orbeck*, 437 U.S. 518 (1978) and *Baldwin v. Fish & Game Comm'n of Montana*, 436 U.S. 371 (1978). These cases make it clear that "one of the privileges which the [Privileges and Immunities] Clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State." *Toomer v. Witsell*, 334 U.S. 385, 396 (1947).

The "public resource" exception to the Privileges and Immunities Clause has no bearing on the case at bar. While the

State does not indicate in its petition what it considers to be the "public resource" involved in the case at bar, presumably the public resource in question is the limited amount of money which New York has. While it might be argued that there is no reason to distinguish between a natural resource and money, cases involving the public resource (or ownership) doctrine have been concerned with natural resources and not with money. *See, Corfield v. Coryell,* 6 F. Cas. 546 (C.C.E.D. Pa. 1825) (oyster beds); *McCready v. Virginia,* 94 U.S. 391 (1877) (oyster beds); *Geer v. Connecticut,* 161 U.S. 519 (1896) (game birds), *overruled, Hughes v. Oklahoma,* 441 U.S. 322 (1979); *State v. Kemp,* 73 S.D. 458, 44 N.W. 2d 213 (1950), *appeal dismissed,* 340 U.S. 923 (1951); (migratory water fowl); *Baldwin v. Fish & Game Comm'n of Montana, supra* (elk); *Hicklin v. Orbeck, supra* (oil and gas).

If one accepts the argument that, because money is a limited public resource, discrimination based on the lack of such money does not violate the Privileges and Immunities Clause, the Clause would effectively be rendered a nullity. Certainly, all states have too little money. If, however, this is considered a "natural" resource which constitutionally may be hoarded for state residents, such an exception to the Privileges and Immunities Clause would swallow up the Clause. States would be able to say that a discrimination against out-of-state residents enhances the health and welfare of the state residents by protecting their jobs from out-of-state competition, thereby assuring that the state residents would not be forced to go on welfare. This Court has recognized, in a related context, that such an argument can not be accepted. *Baldwin v. G.A.F. Seelig, Inc.,* 294 U.S. 511, 522-23 (1935). *See also, Brown v. Anderson,* 202 F.Supp. 96, 101-102 (D. Alas. 1962).

It may be thought that because the work of Salla and Keppley involves public employment the State is held to a lesser standard. It is clear, however, that the work of Salla and Keppley is "public employment" only in the loosest sense of the term. The

work they are performing is work in "the common occupations of the community". *Truax v. Raich,* 239 U.S. 33, 41 (1915). They are not engaged in any sense in work which involves the right to govern citizens of New York or in work which involves participation in the formulation and execution of important state policy. *Ambach v. Norwick,* 441 U.S. 68 (1979); *Foley v. Connelie,* 435 U.S. 291 (1978).

The argument against the constitutionality of this statute under the Equal Protection Clause already has been discussed. While the Equal Protection ground was not reached by either the Appellate Division or the New York Court of Appeals, the Appellate Division did decide that the statute was unconstitutional as being in violation of the Commerce Clause of the United States Constitution.

Essentially, the legislation in question is designed to protect job opportunities for New York residents. This Court has consistently rejected such economic protectionism as being a *per se* violation of the Commerce Clause. *City of Philadelphia v. New Jersey,* 437 U.S. 617 (1978); *Boston Stock Exchange v. State Tax Comm'n,* 429 U.S. 318 (1977).

The argument repeatedly has been made by the State that New York simply is spending its own money and has a right to prefer its residents in the spending of these monies. However, 75% of this project is federally funded and, therefore, residents of other states are being asked to subsidize a scheme that New York ostensibly developed to try to help deal with unemployment in the construction industry. The record in this case reveals that Lisbon has a crew of supervisory employees who have worked with it for a number of years. Obviously, these crews work more efficiently, and at a lower cost, than would persons who do not have experience with Lisbon. To the extent, therefore, that Lisbon is forced to hire persons who may not be as experienced in the type of work being done or decides not to compete in New York because it is unable to use its regular

employees, the basic purpose of the Commerce Clause, to promote free trade among the states, is frustrated. *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 335 (1977). For this reason as well, §222 is unconstitutional.

CONCLUSION

For the reasons stated, the petition for certiorari should be denied.

Dated: March 24, 1980
Rochester, New York

Respectfully submitted,

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In The

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-1335

ROBERT ABRAMS, as Attorney General of the State of New York,

Petitioner,

against

DAVID S. SALLA, ROBERT W. KEPPLEY, and LISBON CONTRACTORS, INC.,

Respondents,

and

COUNTY OF MONROE, etc.,

Respondents

On Petition For A Writ of Certiorari To The Court of Appeals of The State of New York

RESPONDENT COUNTY OF MONROE'S BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
Reasons for Granting the Writ	2
The Privileges and Immunities Clause	2
The Commerce Clause	4
The Equal Protection Clause	4
Conclusion	5

TABLE OF AUTHORITIES

Cases:	Page
Baldwin v. Fish and Game Commission of Montana, 436 U.S. 371 (1978)	3
City of Philadelphia v. New Jersey, 98 S.Ct. 2531 (1978)	4
Doe v. Bolton, 410 U.S. 179 (1973)	2
Hicklin v. Orbeck, 437 U.S. 518 (1978)	2, 3
Huges v. Alexandria Scrap, Corp., 426 U.S. 794 (1976)	4
McCready v. Commonwealth of Virginia, 94 U.S. 391 (1876)	2
Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974)	4
Shapiro v. Thompson, 394 U.S. 618 (1969)	4
Statutes:	
United States Constitution:	
Article I, Section 8, Commerce Clause	4
Article IV, Section 2, Privileges and Immunity Clause	2, 3
Article XIV, Section 1	4
New York Statute:	
Labor Law, Section 222	2, 3, 4
Other Authorities:	
Tribe, American Constitutional Law, Section 6.33, Supp (1979)	2

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Respondents

On Petition For A Writ of Certiorari To The Court of Appeals of The State of New York

RESPONDENT COUNTY OF MONROE'S BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The respondents, County of Monroe of the State of New York and the Division of Pure Waters of the County of Monroe, respectfully request that this Court grant the petition for writ of certiorari, seeking review of the decision of the Court of Appeals of the State of New York.

REASONS FOR GRANTING THE WRIT

1. The decisions below directly conflict with this Court's Privileges and Immunities rulings in *Hicklin v. Orbeck*, and *Doe v. Bolton*.

In *Hicklin v. Orbeck*, 437 U.S. 518 (1978), this Court continued to recognize the limited right of a State to limit nonresident access to State-owned or created resources as such right was set forth in decisions such as *McCready v. Commonwealth of Virginia*, 94 U.S. 391 (1876) and *Doe v. Bolton*, 410 U.S. 179 (1973). (See also Tribe, American Constitutional Law, Section 6.33 Supp. (1979), pp. 38-39). Indeed, in *Hicklin, supra*, this Court stated that generally, State ownership of the particular resource in question will be dispositive of the issue. *Hicklin* at 530.

It is true this Court did strike down the Alaska statute at issue in *Hicklin, supra*. However, this Court indicated that the reason the Alaska statute requiring only Alaskan residents to be hired on the Alaska pipeline project was held in violation of the Privileges and Immunities Clause was that the Alaska statute exceeded the bounds of the public ownership doctrine by potentially applying to employers who had no connection with Alaska at all. As this Court stated:

> Under this provision, Alaska Hire extends to employers who have no connection whatsoever with the State's oil and gas, perform no work on State land, have no contractual relationship with the State. The Act goes so far as to reach suppliers who provide goods or services to subcontractors, who, in turn, perform work for contractors despite the fact that none of these employers may have direct dealings with the State's oil and gas and never set foot on State land. at 437 U.S. 530.

In the case at bar, the New York Court of Appeals declared that Section 222 of the New York State Labor Law violated the Privileges and Immunities Clause and, therefore, declared Section 222 unconstitutional. Section 222 requires that a

preference be given to New York State residents on public works projects. In light of the aforesaid holdings of this Court regarding the public ownership doctrine, the Court of Appeals' holding was erroneous.

Section 222 clearly falls within the public ownership doctrine. The State resource in which New York State is preferring its own residents is in the expanded employment opportunities that are created whenever the State embarks upon a public works project. Moreover, unlike the statute in *Hicklin, supra*, Section 222 does not overstep the public ownership exception. Section 222's restrictions apply only to construction activity taking place on State lands. Also, unlike the *Hicklin, supra*, statute, Section 222 does not attempt to regulate private employers. The restrictions of Section 222 have absolutely no applicability to the private construction industry in New York.

Finally, contrary to the assertions of the Court of Appeals, the presence of federal funding for the construction project at issue herein has no relevance to the Privileges and Immunities analysis herein. The record in this case does not indicate that Congress, in enacting the legislation that gave rise to the sewer construction project at issue, placed any restrictions on New York's ability to limit employment to New York State residents. (See *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371 (1978) at page 390, fn 23.)

In conclusion, as Justice Gabrielli of the New York Court of Appeals stated in his dissenting opinion:

> While it is true that a state may not boldly exploit its passive ownership of a resource by indirectly using it as a basis for requiring discrimination against nonresidents in private hiring, nothing in *Hicklin* or the cases preceding it suggests that when a state has created a resource such as job opportunities, it cannot direct that the resources be used to the advantage of its own citizens.

2. The decisions below directly conflict with this Court's Commerce Clause holding in *Hughes v. Alexandria Scrap.*

This Court has specifically held that where a state, through the exercise of its spending power, creates a market that would not otherwise have existed, that the Commerce Clause is not violated if the state seeks to limit access to the state-subsidized market to state residents only. *Hughes v. Alexandria Scrap, Corp.*, 426 U.S. 794 (1976) at pp 806-810. (See also, *City of Philadelphia v. New Jersey*, 98 S.Ct. 2531 (1978), at fn. 6.)

In the case at bar, the lower New York Courts erroneously held that Section 222 violates the Commerce Clause. The construction project at issue herein is a totally State created market which would not have existed but for the State deciding to exercise its spending powers and commence this construction project. Since Section 222's restrictions are applicable only to the State created jobs on public construction projects, Section 222 does not run afoul of the Commerce Clause.

3. The decisions below directly conflict with this Court's Equal Protection holdings in *Shapiro v. Thompson* and *Memorial Hospital v. Maricopa County.*

In *Shapiro v. Thompson*, 394 U.S. 618 (1969) this Court held that the right to travel is a fundamental right and consequently any State statute seeking to limit the right to travel must be able to withstand the compelling state interest test. In *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974), however, this Court held that only travel into a State with the intent to remain therein is accorded fundamental right status.

In the case at bar, the lower New York Courts erroneously held that Section 222 violated respondents' Salla's and Keppley's right to travel. However, the record herein clearly indicated that Salla and Keppley came to New York to work on the construction project at issue herein without any intent to remain or settle in New York. Hence, it was an error for the lower Courts

to hold that Keppley's and Salla's fundamental right to travel was violated.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Dated: Rochester, New York
March 26, 1980

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In The

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1335

ROBERT ABRAMS, as Attorney General of the State of New York,

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against

DAVID S. SALLA, ROBERT W. KEPPLEY, and LISBON CONTRACTORS, INC.,

Respondents,

and

COUNTY OF MONROE, etc.,

Respondents.

On Petition For A Writ of Certiorari To The Court of Appeals Of The State of New York

BRIEF OF RESPONDENTS, DAVID S. SALLA, ROBERT W. KEPPLEY, and LISBON CONTRACTORS, INC. IN OPPOSITION TO BRIEF SUBMITTED BY RESPONDENT, COUNTY OF MONROE, IN SUPPORT OF PETITION FOR CERTIORARI

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TABLE OF CONTENTS

	Page
REASONS WHY THE WRIT SHOULD BE DENIED . . .	2
1. *The writ should be denied for the reasons set forth in the brief, dated March 24, 1980, submitted by respondents, David S. Salla, Robert W. Keppley, and Lisbon Contractors, Inc., in opposition to the petition for certiorari*	2
2. *The Congressional intent with respect to §222 of the Labor Law has been made clear in various federal regulations and in memoranda of law filed by the United States in a case involving the applicability of §222 to projects funded by the Environmental Protection Agency*	3
CONCLUSION	5

TABLE OF AUTHORITIES

Cases Cited:	Page
Baldwin v. Fish and Game Comm'n of Montana, 436 U.S. 371 (1978)	3
Happy Investment Group v. Lakeworld Properties, Inc., 396 F. Supp. 175 (N.D. Cal. 1975)	5
Hunt, et al. v. Firelands Sewer and Water Construction Co., Inc., et al., (W. D. N. Y., Civil Action No. 75-425) (no decision rendered)	4, 5
Regulations:	
40 C.F.R. §35.002 (1979)	3
40 C.F.R. §35.840 (b) (1979)	3
40 C.F.R. §35.936-2 (c) (1979)	4
40 C.F.R. §35.938-4 (h) (4) (1979)	4

In The

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On Petition For A Writ of Certiorari To The Court of Appeals Of The State of New York

BRIEF OF RESPONDENTS, DAVID S. SALLA, ROBERT W. KEPPLEY, and LISBON CONTRACTORS, INC. IN OPPOSITION TO BRIEF SUBMITTED BY RESPONDENT, COUNTY OF MONROE, IN SUPPORT OF PETITION FOR CERTIORARI

The respondents, David S. Salla, Robert W. Keppley, and Lisbon Contractors, Inc., respectfully request that this Court deny the petition for writ of certiorari, seeking review of the decision of the Court of Appeals of the State of New York.

REASONS WHY THE WRIT SHOULD BE DENIED

1. ***The writ should be denied for the reasons set forth in the brief, dated March 24, 1980, submitted by respondents, David S. Salla, Robert W. Keppley, and Lisbon Contractors, Inc., in opposition to the petition for certiorari.***

Petitioner, Robert Abrams, as Attorney General of the State of New York, filed a petition for writ of certiorari in this Court on February 27, 1980. Respondents, David S. Salla, Robert W. Keppley, and Lisbon Contractors, Inc. (hereinafter referred to respectively as "Salla", "Keppley", and "Lisbon"), filed a brief, dated March 24, 1980, in opposition to the petition.

Respondent, County of Monroe (hereinafter referred to as "the County"), also petitioned for writ of certiorari and this petition was filed on March 24, 1980. However, it was determined by the Clerk of this Court that the petition was not timely filed. The County was, however, given permission to file a brief in support of the petition for certiorari and it did so by filing a brief, dated March 26, 1980, in this Court.

The arguments made by the County in its brief are essentially the arguments made by the State of New York in its petition for certiorari. These arguments were answered by Salla, Keppley and Lisbon in their brief in opposition. The positions advanced by Salla, Keppley, and Lisbon in their brief in opposition need not be repeated here, but they respectfully refer this Court to the arguments made in their earlier brief and incorporate these arguments by reference in this brief. There is only one additional argument which they wish to bring to this Court's attention, and this additional argument is set forth in the material which follows.

2. ***The Congressional intent with respect to §222 of the Labor Law has been made clear in various federal regulations and in memoranda of law filed by the United States in a case involving the applicability of §222 to projects funded by the Environmental Protection Agency.***

In its brief (page 3), the County argues that there is nothing in the record of this case to indicate that Congress, in enacting the legislation that gave rise to the construction project in issue (the Environmental Protection Act and Pure Waters Act), placed any restriction on New York's ability to limit employment to New York residents. It argues that this Court's statement in *Baldwin v. Fish and Game Comm'n of Montana*, 436 U.S. 371, 390, n. 23 (1978), indicates that the alleged absence of Congressional restrictions on the grants of funds to New York is a significant fact to be considered in any analysis of statutes like §222.

As pointed out by Salla, Keppley and Lisbon in their earlier brief (pages 7-8), the activity involved in *Baldwin* was not so basic and fundamental that interference with it would frustrate the very purpose of the Union. This Court consistently contrasted the right to engage in activities like recreational game hunting with fundamental rights such as the right of a non-resident to "pursue a livelihood in a state other than his own [which is] a right that is protected by the Privileges and Immunities Clause." *Id.* at 386.

Even apart from this argument, however, there are specific federal regulations dealing with the award of grants by the Environmental Protection Agency to state and local governments. All of the grants are subject to the provisions of the regulations contained in 40 C.F.R., Part 35 (1979). [40 C.F.R. §35.002 (1979)]. An analysis of these regulations demonstrates that laws such as §222 are in conflict with federal requirements.

Three sections of Part 35 are particularly applicable. Pursuant to 40 C.F.R. §35.840 (b) (1979), ". . . the award of the contract will

be made to the responsible bidder submitting the lowest responsive bid, which shall be determined without regard to State or local law whereby preference is given on factors other than the amount bid." In addition, 40 C.F.R. §35.938-4 (h) (4) (1979) provides that "State or local laws, ordinances, regulations or procedures which are designed or which operate to give local or in-State bidders preference over other bidders shall not be employed in evaluating bids." Almost identical language is contained in 40 C.F.R. §35.936-2 (c) (1979) which provides that "State or local laws, ordinances, regulations or procedures which effectively give local or in-State bidders or proposers preference over other bidders or proposers shall not be employed in evaluating bids or proposals for subagreements under a grant."

In an action in the United States District Court for the Western District of New York, the United States took the position that §222 is in conflict with the federal regulations just cited. In *Hunt, et al. v. Firelands Sewer and Water Construction Co., Inc., et al.* (Civil Action No. 75-425), a group of unemployed construction workers brought an action against various town and public officials for failing to enforce §222 of the Labor Law. The town officials, facing the possible loss of federal funds if they enforced §222, and the possible loss of state funds if they failed to enforce §222 commenced a third-party declaratory judgment action against the United States.

In both his memorandum of law and reply memorandum of law submitted in that case, the United States Attorney specifically stated that §222 was in conflict with several regulations contained in Title 40, Part 35. He pointed out that, pursuant to §222, an out-of-state company would be barred from using its usual work force if its usual work force was composed of non-New York residents. In such a case, the out-of-state bidder would have to hire new key operating personnel and a new foreman to supervise the work, thereby placing the out-of-state bidder at a serious disadvantage.

The United States Attorney argued that by discouraging the submission of bids by out-of-state contractors, §222 was frustrating the free and open competition mandated by the federal regulations. He concluded in his reply memorandum of law that there existed "a total incompatibility between Section 222 and the EPA regulations." (Page 14 of reply memorandum of law, dated December 17, 1975).

Although there was never a decision rendered in *Hunt, et al. v. Firelands Sewer and Water Construction Co., Inc., et al.*, this Court can take judicial notice of the position of the United States in that case. *Happy Investment Group v. Lakeworld Properties, Inc.*, 396 F. Supp. 175, 183, n. 6 (N.D. Cal. 1975). The position of the United States is consistent with the applicable federal regulations. Clearly, §222 is in direct conflict with the purposes of the Environmental Protection Act and the regulations promulgated by the Environmental Protection Agency.

CONCLUSION

For the reasons stated, the petition for certiorari should be denied.

Dated: April 2, 1980
Rochester, New York

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